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Federal Communications Commission
Office of Secretary

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: CC Docket No. 96-237

Dear Mr. Caton:

Transmitted herewith, on behalf of The Rural Telephone Coalition, are an original and 16 copies of its reply comments in response to comments filed in the above-referenced proceeding.

In the event of any questions concerning this matter, please communicate with this office.

Very truly yours,


Margot Smiley Humphrey

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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Infrastructure
Sharing Provisions in the
Telecommunications Act of 1996

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CC Docket No. 96-237

REPLY COMMENTS

OF THE

RURAL TELEPHONE COALITION

The Rural Telephone Coalition (RTC), by its attorneys, files these reply comments in response to petitions for reconsideration of the Commission's decision¹ in the above-captioned proceeding implementing section 259 of the Communications Act, as amended in 1996.² MCI Telecommunications Corporation (MCI) challenges the Order for implementing sharing through

¹ In the Matter of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, CC Docket No. 96-237, FCC 96-456 (released November 22, 1996) (Order).

² 47 U.S.C. §259.

negotiations rather than prescribing a pricing methodology. With regard to intellectual property involved in a request for sharing. BellSouth Corporation (BellSouth), Southwestern Bell Telephone Company (SWB) and GTE Service Corporation (GTE) seek to require a qualifying local exchange carrier (QLEC) to arrange on its own for any enlargement in the scope of the license held by the providing local exchange carrier (PLEC).

All of the petitions are without merit. The MCI petition rests on a tortured reading of the requirement that a QLEC “fully benefit” from the economies of scale involved in the sharing arrangement. MCI’s unjustified reading would transform private “sharing” into federal government micromanagement. The intellectual property licensing critics would, conversely, have the Commission intervene to preclude QLECs from “fully benefit[ing]” from the potential economies of extending a large scale licensing arrangement that is already in place, rather than seeking a separate, small-scale license. Their purpose is solely to spare PLECs required to share from making even a simple request to the intellectual property owner for a modest expansion of the license. These attempts to dictate the terms for sharing infrastructure and to exclude licensed components of “infrastructure” from the sharing mandate conflict with the infrastructure sharing section’s purpose and emphasis on joint action and cooperation between QLECs and PLECs and should be rejected.

Carrier-Negotiated Sharing, Subject to Regulatory Intervention Only If Necessary to Enforce the Act, Properly Relies on the Cooperation the Act Intends for the Infrastructure Sharing Relationship

MCI’s demand for pricing rules to govern infrastructure sharing arrangements rests on a logical fallacy and legal non sequitur. MCI’s faulty reasoning (p. 2-3) is that the Act’s requirement that infrastructure-sharing QLECs must benefit “fully” from the PLEC’s economies

of scale and scope” requires the conclusion that a “PLEC[] should not benefit from economies of scale and scope in its relation with the QLEC.” The conclusion does not follow logically from the premise any more than stating that one of two riders on a tandem bicycle benefitting fully from the pedaling of the other means that the second rider does not benefit from the force exerted by the first rider. Nor does it follow legally that maximizing the benefits for one party to an agreement equates to prohibiting any benefit to the other.

Economies of scale and scope can be enhanced for both sharing participants, even if one starts with substantial economies. The provision expressly contemplates, in section 259(b)(5), “conditions that promote cooperation” between the participants in an infrastructure sharing arrangement, and negotiation is undeniably more conducive to cooperation than is government micromanagement. Moreover, nothing in section 259(b)(4) even hints that the “guidelines” for “just and reasonable terms and conditions” and the purpose of making available to QLECs the full benefits of economies of scale and scope require strict Commission regulation of the price for sharing. Indeed, “sharing” means both “divid[ing]” or “apportion[ing]” and “receiv[ing], us[ing], experienc[ing], enjoy[ing], endur[ing], etc. in common with another or others.”³ The mutuality inherent in sharing is better served by negotiation, with regulatory intervention confined to failures in cooperative efforts to set terms and conditions agreeable to both parties. As the Order points out (para. 81), a QLEC can resort to regulatory enforcement -- via the Commission’s complaint on declaratory ruling processes -- if negotiations do not secure what it regards as the full benefits of the PLEC’s economies of scale and scope.

³ Webster’s New World Dictionary, Second College Edition, p. 1309.

MCI's argument that the phrase "fully benefit" not only precludes negotiation, but also actually mandates prescription of a particular form of incremental pricing (pp. 4-5) and filing of compliant incremental cost studies (p. 6) are fundamentally at odds with the specific prohibition in section 259(b)(3) against treating infrastructure sharing as common carriage.⁴ Prescribing prices and costing methodology, as well as requiring the filing of supporting cost studies, are weapons in the basic arsenal of common carrier regulation. In contrast, section 259(b)(7) calls only for after-the-fact filing of the agreed-upon rates, terms and conditions for an arrangement.

The Act itself contains ample proof that Congress did not consider negotiation as inconsistent with general statutory standards: The interconnection regime established in sections 251 and 252 relies on negotiations in the first instance, even where the far more controversial relationships between competitors are at stake. It is ridiculous to suggest that Congress tacitly intended stricter price regulation for cooperative, preferential arrangements between carriers that are expressly unavailable for use to compete with the provider.

It Is Lawful and Consistent With Congressional Intent to Require PLECs to Request Third Parties to Extend Intellectual Property Licensing Necessary to Sharing Infrastructure On Terms that Reflect All Economies of Scale and Scope Reflected in Such Licensing Arrangements

Although the duty to make available the full benefits of a PLEC's economies of scale and scope does not amount to an implicit requirement for common carrier pricing and costing regulation, it requires more than the stingy notification about third party licensing rights and

⁴ Section 259(b)(3) requires the Commission to "ensure that such local exchange carrier will not be treated by the Commission or any State as a common carrier for hire or as offering common carrier services with respect to any infrastructure technology, information facilities, or functions made available to a qualifying carrier in accordance with regulations issued pursuant to this section."

circumstances contemplated by BellSouth and SWB. While it is true that the Act does not confer Commission jurisdiction over the rights of third parties to license their intellectual property, the Commission has not sought to infringe third party rights or force PLECs to take on any obligations not contemplated in the statute. The Act contemplates mutual arrangements and cooperation between PLECs and QLECs to achieve economies of scope and scale. The Commission has merely articulated the need for a reasonable level of cooperation with respect to the licensing needs of QLECs. It is well within the Commission's jurisdiction and the express requirements of section 259(b)(4) to involve PLECs requested to share infrastructure in seeking extension to the shared activity of a third party license they have obtained.

It is not unduly burdensome, let alone "economically unreasonable or contrary to the public interest,"⁵ to interpret the clear mandate for making available the full benefits of a PLEC's economies of scale and scope⁶ to require a PLEC at least to approach the third party licensee to ask whether its license can be extended to cover the QLEC sharing arrangement on terms and conditions, including price, that reflect any economies, discounts or large customer breaks in its own licensing arrangement. That is all the Commission requires here. It is highly unlikely that a third party, eager to license or continue to license its product to PLECs — a class likely to include some of the world's largest companies— would not offer it terms and prices that reflect its importance as a customer and the size of the operations involved in a licensing arrangement. These arrangements are the fruit of the economies of scale and scope of its

⁵ Section 259(b)(1).

⁶ Section 259(b)(4).

operation as much as are discounts for purchasing multiple switches or extensive software upgrades. It would plainly not satisfy the infrastructure sharing mandate to require a QLEC to buy its own switch to acquire a requested functionality, install capabilities it seeks to share under a separate stand-alone contract with the PLEC's software supplier or contract individually with a manufacturer for the entire system necessary to provide SS7 signaling in its service area. The purpose of infrastructure sharing is to spare small rural LECs the need to choose between stand-alone provision or forgoing network capabilities that are not cost-effective on a small scale.

A third party would also be far more likely to extend favorable big- customer arrangements to include a sharing arrangement than it would be to grant equally favorable terms, conditions and prices for a small, stand-alone licensing arrangement negotiated by a relative market bit-player. The PLEC would not stand to lose from seeking an extension, since whatever price the third party offered for extending the license to the sharing arrangement would presumably be passed on to the QLEC. In the event that a good faith request by a PLEC for such an extension of its large customer licensing arrangement were unsuccessful, the QLEC would have to pursue a stand-alone license on its own. Consequently, the Commission should not deny QLECs the benefit of a good faith request by a PLEC to obtain any economies of scale and scope reflected in its licensing arrangements for an extension of the license to an infrastructure sharing arrangement.

Conclusion

The Commission should reject MCI's attempt to distort the Act's reasonable mandate for QLEC access to the full benefits of a PLEC's economies of scale and scope — through

cooperative sharing without common carrier regulation — into an unlawful mandate for a full blown common carrier price and costing regulation scheme. Negotiations between QLECs and PLECs, with the backstop of regulatory intervention if necessary to prevent PLEC denial of suitable arrangements, are plainly more in keeping with the letter and spirit of infrastructure sharing.

The Commission should also deny the efforts by PLECs to evade their responsibility under section 259(b)(4) for reasonable efforts to secure for QLEC infrastructure sharing arrangements whatever economies of scale and scope they enjoy in their license arrangements for intellectual property when licensing is necessary for any infrastructure sharing request.

Respectfully submitted,

THE RURAL TELEPHONE COALITION

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April 30, 1997

CERTIFICATE OF SERVICE

I, Weldrena Jones-Bean, hereby certify that a true copy of the "Reply Comments of the Rural Telephone Coalition" was sent on this, the 30th day of April, 1997 by first class United States mail, postage prepaid, to those listed below:

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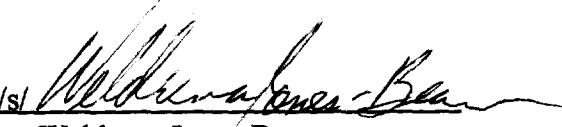
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